

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
 BRANCH 5
 CIVIL DIVISION

UWM INDEPENDENT MAINTENANCE
 LOCAL #1,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT RELATIONS
 COMMISSION,

Respondent.

MEMORANDUM DECISION

This is a petition under sections 227.16, 227.20 and 111.07(8) Stats., for judicial review of a decision and order of the Wisconsin Employment Relations Commission.

UWM Independent Maintenance Local #1, the petitioner here, filed a complaint with the Wisconsin Employment Relations Commission alleging that the University of Wisconsin-Milwaukee, the respondent there, was in violation of Grievance Procedure No. P-179 and Chapter 612, section 111.82, section 111.84 (a), (d), and section 111.91 (c), Stats.

In an amended complaint Local #1 complained that UW-M was engaged in unfair labor practices contrary to the provisions of Chapter 111 Stats., alleging specifically in respect thereto that UW-M (1) failed to process a joint grievance at the request of Mr. James Higgins, President of Local #1, (2) failed to allow the aggrieved employees' representative Mr. Marvin Matuszak, time off from work to present (participate in) the said grievance, (3) failed to rescind a union dues check-off on notification of eleven employees (members of Local #82) that they wished to have UW-M stop deducting dues to Local #82, and (4) failed to pay an officer of Local #1 (Mr. Higgins) for time spent in appearing at a hearing before the WERC.

UW-M specifically denied the allegations of the first, second and fourth alleged grounds, alleged affirmatively that the bulletin on Grievance Procedure had not been adopted by it and denied knowledge or information sufficient to form a belief as to the truth of the allegations which constituted the third ground.

The complainant withdrew the fourth ground prior to the close of the hearing before the Commission.

The WERC found that at all times material to the proceedings no employee group or labor organization was ever voluntarily recognized or certified as the bargaining representative of any of the respondent's employees in any appropriate collective bargaining unit, and that no collective bargaining agreement, covering the conditions of employment of respondent's employees, existed between the respondent and any employee or labor organization (3rd finding); that in June 1967, contrary to a grievance procedure previously unilaterally established by it, the respondent failed to allow the Vice-President of UW-M Independent Maintenance Local #1 (complainant) to assist in the proceeding of a grievance filed by the employees with respect to the placing of newly hired employees in a job assignment desired by employees having greater seniority, but complainant

did not establish that respondent's action was motivated in an attempt to dissuade or persuade any of its employees to form, join or assist any employee or labor organization of their own choice, or to encourage or discourage employees to become members of any employee or labor organization (4th finding); that in December 1966, twelve employees of respondent, who had previously authorized respondent to check off from their earnings' monthly dues to Local 82, Wisconsin State Employees Association, AFSCME, a labor organization having as members various employees of respondent, attempted to rescind such authorization; and that, however, complainant failed to establish that respondent received such revocation in accordance with established procedure (5th finding).

On the basis of these findings of fact the Commission concluded that the University of Wisconsin-Milwaukee, did not commit, and is not committing, any prohibited practice within the meaning of the State Employment Labor Relations Act and ordered that the complaint filed in the proceeding be dismissed.

The petition for review alleges that substantial rights of the petitioner have been prejudiced as a result of the administrative decision being (a) contrary to constitutional rights or privileges, (b) in excess of the statutory authority or jurisdiction of the agency, or affected by other error of law, (c) made or promulgated upon unlawful procedure, (d) unsupported by substantial evidence in view of the entire record as submitted, and (3) arbitrary and capricious.

UW-M appears in this proceeding and states as its position that the court lacks jurisdiction; and if said jurisdictional objection is not sustained that it is its position that the order should be affirmed.

1.) In the second paragraph of the amended complaint Local #1 alleges that the UW-M "is in violation of Grievance Procedure No. P-179 and Chapter 612, 111.82, 111.84 (a) (d), 111.91 (c)."

Petitioner maintains "that on the basis of that allegation there was jurisdiction in the WERC to hear the questions raised by the complainant."

Insofar as employment relations and controversies between the state as an employer and state employees are involved, the jurisdiction of the WERC is established and defined in sections 111.84 and 111.85 Stats., and this proceeding concerns only prohibited practices under those sections.

This is a prohibited practice case and this review is limited to the jurisdictional objection.

2.) Administrative decisions, except the decisions of the department of taxation, the commissioner of banks and the commissioner of savings and loan associations, shall be subject to judicial review as provided by Chapter 227. Section 227.15.

Section 227.16 (1) provides: "Except as otherwise specifically provided by law, any person aggrieved by a decision specified in section 227.15 and directly affected thereby shall be entitled to judicial review thereof as provided in this chapter." The subsection further provides in material part: "Proceedings for review shall be instituted by serving a petition therefor * * * and by filing such petition in the office of the clerk of the circuit court for Dane county (unless a different place of review is expressly provided by law) * * *."

It is a well-established rule of law "that, where a new right is created or power conferred and a particular method of review is prescribed by the act creating the right or conferring the power, that method of review must be pursued." State v. Fasekas, 223 Wis. 356, 269 N. W. 700. And in Donny v. Chain of Lakes Cheese Co., 254 Wis. 85, 85 N. W. (2d) 33, it is said: "Appeal in this state, as in most states, is a matter of statute. * * *

If a party desires to avail himself of that right he must pursue the method prescribed by statute." See also 82 C. J. S. Statutes, sections 393, 395; 3 Am. Jur. Appeal and Error, section 413; 4 C. J. S. Appeal and Error, sections 42, 43.

A similar jurisdictional question was raised by demurrer in Wisconsin Valley Imp. Co. v. Public Serv. Comm., 7 Wis. (2d) 120, 125, 126, 95 N. W. (2d) 767. That was an action by the plaintiff improvement company to set aside an order of the Public Service Commission denying the improvement company's application for a permit to build a dam. The action was commenced in the circuit court of Lincoln county. The court there construed section 227.16 (1) Stats., as authorizing review of the commission's order in the manner provided in Chapter 227 in the circuit court of Lincoln county; the fact that the review was sought by summons and complaint instead of petition as prescribed by section 227.16 (1) was deemed to be immaterial.

There the court said: "It does not follow, however, from the conclusions thus reached as to the applicability and exclusiveness of judicial review under ch. 227, Stats., that such review can be had only in Dane County. Sec. 227.16 (1), Stats., quoted above, says that the petition for review shall be filed in the circuit court for Dane County 'unless a different place of review is expressly provided by law.' We think that sec. 6 (3) of ch. 497, Laws of 1939, expressly provides a different place of review, namely the circuit court for the county where the property affected is located, in this case, Lincoln County. * * *"

It was noted that in Muench v. Public Service Comm. (1952), 261 Wis. 492, 53 N. W. (2d) 514, the court called attention to the legislative purpose in the enactment of Chapter 227 to establish a uniform method of review and referred to an article by Mr. Ralph M. Hoyt, Chairman of the committee which drafted the act in which the purpose to secure uniformity of review in all respects but place of trial was emphasized. (1944 Wisconsin Law Review, 214.)

The court said:

"In the interpretation of ch. 227, Stats., the above-mentioned article is entitled to weight, as we recognized in the Muench Case, supra. The general purpose of the act to secure uniformity of method of review but not necessarily of the place of review is stated by the author of the article in the following words (p. 230):

"'Place of review. The act provides that review shall be in the circuit court of Dane county unless a different place of review is expressly provided by law. There has been much debate as to whether the review of administrative orders ought to be concentrated in the circuit court at the seat of government or whether it should be scattered among the circuits of the state. The sponsors of the uniform act did not consider it wise to open up that question in connection with the new act; therefore in the process of amending the numerous separate administrative acts to provide for review as in chapter 227, care was taken to leave the place of review unchanged.'"

The petitioner here relies on Milwaukee County Dist. Council v. Wis. F. R. Bd., 23 Wis. (2d) 303, which it refers to as a case "almost on all fours with the case here." That was an action to review a certification by the WERB of the City of Milwaukee Garbage Collection Laborers Independent Local Union as exclusive collective-bargaining representative for city employees in a particular bargaining unit. The petitioner, which

had participated in the election, alleged that it was aggrieved by the certification because void ballots were counted for the Independent Union.

The court pointed out that section 111.70 (4) (d), Stats., authorizes the board to conduct an election among employees of a municipality to determine whether they desire to be represented by a labor organization and provides: "Proceedings in representation cases shall be in accordance with ss. 111.02 (6) and 111.05 insofar as applicable, * * *."

The court held that section 111.70 (4) (d) by its terms imports the procedure for review prescribed in Chapter 227 in the circuit court of the county in which the appellant or any party resides or transacts business. (Section 111.07 (8)).

UW-M notes that the Milwaukee County Dist. Council case did not involve the statutory provision under consideration here, noting also the specific provision of the last sentence of section 111.83 (3).

The case is not considered conclusive of the jurisdictional question here.

3.) Section 111.84 defines what are prohibited practices by a state employer.

Section 111.85, relating to prevention of prohibited practices, provides that any controversy concerning prohibited practices may be submitted to the commission as provided in section 111.07, except that references therein to "unfair labor practices" shall be construed to refer to "prohibited practices."

It is the position of UW-M that it was the legislative intent in section 111.85 to limit the application of section 111.07 in prohibited practice controversies to the provisions in section 111.07 relating to the submission of controversies to the commission. Under this construction subsection (8) of section 111.07 providing that the order of the commission shall be subject to review in the manner provided in chapter 227, "except that the place of review shall be the circuit court of the county in which the appellant or any party resides or transacts business" would not be applicable to prohibited practice cases.

In the court's opinion this is too limited a construction.

While section 111.85 provides that any controversy concerning prohibited practices may be submitted to the board as provided in section 111.07, it is noted that identical language is used in section 111.07 (1) relating to the prevention of unfair labor practices. Section 111.85 provides that references in section 111.07 to "unfair labor practices" shall be construed to refer to "prohibited practices" and under section 111.07 any controversy may be submitted in the manner and with the effect provided in this subchapter.

As section 111.85 specifically provides that references to "unfair labor practices" in section 111.07 shall be construed to refer to "prohibited practices" it would seem reasonably and logically to follow that the "order" in an unfair labor practice controversy referred to in subsection (8) of section 111.07 has like reference to a controversy concerning prohibited practices. This, in the court's opinion, is a reasonable statutory construction.

The court concludes then that section 111.85 which provides that any controversy concerning prohibited practices may be submitted to the board as provided in section 111.07, contemplates or imports the procedure for the review of an order made in such proceeding prescribed in subsection (8) of the statute and that the circuit court of Milwaukee County has jurisdiction in this matter.

Accordingly the objection to the court's jurisdiction is dismissed.
Without costs.

An order in conformity herewith will be presented.

Respectfully submitted,

Elmer W. Roller /s/
Circuit Judge

Dated November 11, 1969.